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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 461

THOMAS HART FISHER AND RUTH PAGE FISHER, HIS WIFE,

Petitioners,

vs.

PRINTING DEVELOPMENTS, INC., A CORPORATION,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

RESTATEMENT OF FACTS.

By their petition for a writ of certiorari, the defendants, Thomas H. Fisher and Ruth Page Fisher, his wife, contest a final judgment for possession entered in an Illinois statutory forcible detainer suit returnable in the Municipal Court of Chicago, Illinois, which judgment provides that the respondent, owner of a building in Chicago, Illinois, have and recover possession of the B-3 storeroom space in the basement of that building from the petitioners (Abst. 1, 2, 7).

There was evidence that each of the defendants continued to use the B-3 storage space in the building, and Mrs. Fisher was, therefore, also made a party defendant (Abst.

20). However, there was no pretense during their joint appeal on the non-federal merits in the appellate court that the defendant Ruth Page Fisher had any claim of a right of occupancy of the storeroom space except through the defendant Thomas Hart Fisher (App. 3-7, Pet. for cert.).

After issuance of summons on June 27, 1956 (Supp. Abst. 1) alias summons on August 23, 1956 (Supp. Abst. 2) and second alias summons on September 13, 1956 (Supp. Abst. 2), with returns by the bailiff "Defendant not found", respondent requested the bailiff to post and mail notices to the defendants under the procedure set up in the Municipal Court of Chicago Act, which provides for posting and mailing of notices in a forcible detainer suit where possession only and no rent is sought (Ill. Rev. Stat. C. 37, para. 403 (1955)).

The endorsement of the bailiff on the notice showed that he posted them in the three public places (Abst. 4) and that he mailed copies of the notices to the building address (Abst. 4).

The defendant, Thomas Hart Fisher, filed an answer (Abst. 5), and testified at the trial (Abst. 26-35).

Instead of contesting jurisdiction of her person in the trial court, under orderly state procedures set up under Illinois practice (Ill. Rev. Stat. C. 110, Sec. 50(6) (1955) or identical Sec. 50(6) Municipal Court of Chicago Rule 1 or under Ill. Rev. Stat. C. 37, Sec. 357, Fourth (d) (1955)), the defendant Ruth Page Fisher served and filed in the court below a joint notice of appeal four days after the judgment for possession had been entered (Supp. Abst. 3) and within the period provided under Illinois practice in which a motion could have been made in the trial court, which would contest the court's jurisdiction of her person on the ground of a defect in the process.

The trial court did not and was not asked by either defendant to pass on any question arising out of any defect in the service of process upon either defendant.

On May 28, 1958 the Illinois Appellate Court held that jurisdiction of the person as distinguished from jurisdiction of the subject matter was a matter which under Illinois law could be and had been waived by each defendant on the facts of this case (Opinion of Ill. App. Court, App. 3-7 of Pet. for Cert.).

The Illinois Appellate Court held the defendant Thomas Hart Fisher to have waived any defect in process by filing his answer, etc., and held the defendant Ruth Page Fisher to have waived any such defect by her failure to raise the point of jurisdiction of her person in the trial court under procedures which were available to her in the trial court (Opinion of Ill. App. Court, App. 3-7 of Pet. for Cert.).

No constitutional point was raised in the Illinois Appellate Court (Pet. for Cert. pp. 2, 11). On June 30, 1958 the Appellate Court denied a petition for rehearing (Pet. for Cert. p. 2). No constitutional point was raised in the petition for rehearing before the intermediate Illinois Appellate Court (Pet. for Cert. pp. 2, 11).

On September 16, 1958, without comment, the Illinois Supreme Court denied leave to appeal from the Appellate Court to the Supreme Court of Illinois (App. I to Pet. for Cert.).

POINTS AGAINST ALLOWANCE OF PETITION.

On the facts the petition for writ of certiorari herein should be denied on either or both of the grounds:

I. The United States Supreme Court does not take a case on petition for certiorari under Title 28, para. 1257(3) or under its Rule 19 to upset a state court judgment on the ground that "due process" under the Fourteenth Amendment was violated where the record does not show that such federal question was raised in the state court at the earliest fair opportunity, or that any state court including the highest state court ever passed upon the point.

II. The Illinois state law applicable and applied by the state court to the facts of this case is that:

> Where a party litigant in a civil lawsuit fails to avail himself in the trial court of the opportunity of using the orderly state procedures and state rules provided such litigant for objection to the jurisdiction of the court over his person, as distinguished from jurisdiction of the subject matter, and where such party litigant, instead of availing himself of any of such orderly processes provided for him in which to raise such objection in the trial court, serves and files a notice of appeal in the trial court, such party litigant is thereby held under state law to have waived or to be estopped from thereafter raising any issue with respect to jurisdiction of his person (Opinion of Appellate Court, App. 4 of Pet. for Cert.).

Such Illinois state law is not in violation of the 14th Amendment of the Federal Constitution.

ARGUMENT.

The petition for certiorari should be denied because:

Point I.

A. PETITIONERS FOR THE FIRST TIME ASSAILED ON CONSTITUTIONAL GROUNDS THE JUDGMENT OF THE MUNICIPAL COURT OF CHICAGO FOR POSSESSION IN THIS ILLINOIS STATUTORY FORCIBLE DETAINER SUIT IN THEIR PETITION FOR LEAVE TO APPEAL TO THE SUPREME COURT OF ILLINOIS FROM THE APPELLATE COURT OF ILLINOIS. NO CONSTITUTIONAL QUESTION WAS PRESENTED TO OR PASSED UPON BY THE TRIAL COURT OR BY THE INTERMEDIATE APPELLATE COURT OR, UNDER ITS PRACTICES, BY THE ILLINOIS SUPREME COURT.

The defendant Thomas Hart Fisher came into the case before judgment. Accordingly if that defendant had desired to raise any issue involving the sufficiency of the process against him he could have proceeded in accordance with the established practice in the court below. Under Sec. 20 of Ch. 110 of the Illinois Civil Practice Act (Municipal Court of Chicago Rule 1, Sec. 20), he could have filed a special appearance "prior to filing any other pleading or motion", and thus preserved any point he may have desired to make with respect to any defect in the posting or mailing of notice to him.

The defendant Ruth Page Fisher came into the case after judgment. She elected to continue the same case by service and filing of notice of appeal within the 5-day period provided by the forcible entry statute. Either under Sec. 50(6) of Ch. 110 of the Illinois Civil Practice Act (Ch. 110 Sec. 50(6) Ill. Rev. Stat. 1955, Rule 1, Sec 50(6) of the Rules of Civil Practice in the Municipal Court of Chicago or under the Municipal Court of Chicago Act (Ill. Rev. Stat. C. 37 para. 376 (1955)), or under the Municipal

Court of Chicago Act (Ch. 37, Sec. 403 First (c) Ill. Rev. Stat. (1955)) she could have specially moved and thus preserved any point she may have desired to make with respect to any defect in the posting or mailing of notices.

No constitutional question was raised or passed on by the intermediate appellate court (Pet. for Cert. pp. 2, 11).

The Supreme Court denied their petition for leave to appeal to it without comment (Pet. for Cert., App. I.).

Illinois Law.

Illinois state law provides that where it does not appear that any constitutional question has been presented to and passed upon by the trial court, and the ruling of such court obtained and preserved in the record, and no error was assigned upon it, such question is not reviewable by the Supreme Court of Illinois. (*Adams* v. *Board of Education of School District 41 DuPage County* (1953), 415 Ill. 227, 233, 234, 112 N. E. (2d) 473, 476.) Although the petitioners filed a petition for rehearing in the intermediate Illinois Appellate Court, there is no showing that a constitutional limitation point was raised there. In fact the petition for certiorari, in compliance with the rule which requires the petitioner to state when the federal question was first raised, states that it was raised in the petition to the Illinois Supreme Court for leave to appeal from the Illinois Appellate Court (Pet. for Cert., p. 11). Under Illinois law this was too late, inasmuch as under Illinois law a "constitutional limitation must be pointed out and preserved for review in order to obtain a determination of such question by this (Illinois Supreme) court." (*Biggs* v. *Cummins*, 5 Ill. (2d) 512, 516, 126 N. E. (2d) 208, 210.)

Whenever a person regards his constitutional rights invaded the duty is on him to raise an objection at the earliest fair opportunity and the failure to do so amounts to a

waiver of the right. (*Village of Riverside* v. *Kuhne* (1947), 397 Ill. 108, 73 N. E. (2d) 286, 287, 288; *Chicago-San Coal Co.* v. *Indus. Com.* (1922), 301 Ill. 389, 392, 134 N. E. 158, 159; *Shoal Creek Coal Co.* v. *Indus. Com.* (1921), 300 Ill. 551, 553, 133 N. E. 218, 219.)

Accordingly by mere denial of leave to appeal from the Appellate Court judgment, which affirmed the Municipal Court of Chicago judgment for possession in this forcible detainer suit, the Supreme Court of Illinois under its state law did not pass on any question of federal constitutionality of that judgment, inasmuch as such question had not been raised, either in the trial court or in such appellate court.

Federal Law.

A federal question which was not decided by the highest court of a State in which a decision could be had because not seasonably raised to evoke its decision under the local state practice, will not be decided by this Court.

Title 28, United States Code, para. 1257.
Barbour v. *Georgia* (1919), 249 U. S. 454, 460.
Missouri, K. & T. Ry. Co. v. *Sealy* (1918), 248 U. S. 363, 364, 365.
Chesapeake & Ohio Railway Co. v. *McDonald* (1909), 214 U. S. 191, 193, 195.

B. THE DUE PROCESS CLAUSE IS NOT A LITIGANT'S AMMUNITION WHICH CAN BE KEPT IN STORAGE TO OBTAIN AN ADVANTAGE OVER THE OTHER PARTY. IT MUST BE RAISED AT THE EARLIEST OPPORTUNITY.

The federal question must be presented to the trial court at the appropriate point under state procedure. (*Hulbert* v. *Chicago*, 202 U. S. 275, 279, 280.) If this is not done the Supreme Court will decline to exercise jurisdiction where the

highest state court is completely silent on the federal question. (*Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291, 309.) In such case the Supreme Court infers, unless it can affirmatively be shown otherwise, that the silence is due to the procedural deficiency. (*Bailey* v. *Anderson*, 326 U. S. 203, 206-7.)

When Federal Question First Raised.

The earliest opportunity to have raised a question of due process by either of the defendants would have been in the trial court, either by motion to quash the process before judgment (Ch. 110, Sec. 20, Ill. Rev. Stat. (1955) or Municipal Court of Chicago Rule 1, Sec. 20), or after judgment, by motion or petition under any one of several procedures which are provided by State law. Ch. 110, Sec. 50(6), Ill. Rev. Stat. (1955); Rule 1, Sec. 50(6) of the Rules of Civil Procedure in the Municipal Court of Chicago; or, under the Municipal Court of Chicago Act (Ch. 37, para. 376, Ill. Rev. Stat. (1955); or under Ch. 37, Sec. 403 First (c), Ill. Rev. Stat. (1955).)

The earliest opportunity to have raised a question of "due process" after the intermediate appellate court applied the crystallized and well documented Illinois law of waiver was in a petition for rehearing before that court. The petition for certiorari shows that a petition for rehearing was filed in the intermediate Illinois Appellate Court (Pet. for Cert., p. 2). It does not show that such constitutional point was raised in the petition for rehearing before the Illinois Appellate Court. On the contrary the petition for certiorari affirmatively states that the constitutional point was raised in the petition for leave to appeal to the Illinois Supreme Court (Pet. for Cert., p. 11) and it was in fact raised for the first time in the petition for leave to appeal to the Illinois Supreme Court, where under its practice it would not have passed on it.

Accordingly the federal question now raised was neither raised in the state court at the earliest opportunity, nor does the record show that any state court, highest or otherwise, ever passed on the point.

Point II.

IF A PARTY FAILS TO AVAIL HIMSELF OF THE OPPORTUNITY OF USING THE ORDERLY PROCEDURES AND RULES PROVIDED FOR OBJECTING TO THE JURISDICTION OF THE TRIAL COURT OVER HIS PERSON, AND BY SUCH FAILURE IS HELD UNDER STATE LAW TO HAVE WAIVED OR TO BE ESTOPPED TO RAISE SUCH OBJECTION THEREAFTER ON APPEAL, OR IN ANY LATER STAGE OF THE SAME CASE, SUCH STATE LAW OF WAIVER OR ESTOPPEL AND ITS APPLICATION TO THE UNDISPUTED FACTS OF THIS CASE IS NOT VIOLATIVE OR CONTRARY TO THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT, AND DOES NOT CONSTITUTE A VIOLATION BY THE STATE OF DUE PROCESS UNDER THAT CLAUSE.

Illinois Law of Waiver.

It is axiomatic that while lack of jurisdiction of the court as to the subject matter cannot be waived, yet the method by which jurisdiction of a particular case within the general class of cases is obtained, and any differences or irregularities in respect thereto, including irregularities in process, may be waived and is waived unless objection is made in accordance with the established practice in the court below.

Wilson Bros. v. *Haege* (1932), 347 Ill. 140, 143.

People v. *United Medical Service* (1936), 362 Ill. 442, 447.

People v. *Village of Lyons* (1948), 400 Ill. 82, 90.

Jurisdiction of the person is in the category of matters which can be waived.

Kelly v. *Brown* (1923), 310 Ill. 319, 323.

To avail themselves of the right to question jurisdiction of a court which has general jurisdiction of the subject matter, defendants should either have not appeared at all or limited their appearance to an objection against the jurisdiction of the court.

Craven v. *Craven* (1950), 407 Ill. 252, 255.

Difference Between Jurisdiction of Person and Jurisdiction of Subject Matter.

Counsel must—and does not—distinguish between cases where a court does not have jurisdiction of the subject matter of the class of cases involved and a factual situation similar to the facts of our case wherein the court did have such jurisdiction. Of course, a judgment is void where the court does not have jurisdiction of the subject matter.

The Municipal Court of Chicago had jurisdiction of the subject matter.

Ch. 37, para. 357, 359, Ill. Rev. Stats. (1955).

The phrase "void judgment" is used 44 different times in the petition for certiorari, and yet it doesn't make for straight thinking to use the word "void" to describe the judgment appealed from. Before the judgment became a judicial coercive sanction by the issuance of a writ of restitution in accordance with its terms, the petitioners, without raising any issue of jurisdiction of their persons, filed and served in the trial court a notice of appeal, and they have had all the benefits of that appeal on the non-federal merits in the state court.

Due process requires that there be an opportunity to

present every available defense, but it need not be before the entry of judgment. (*American Surety Co.* v. *Baldwin*, 287 U. S. 156, at 168.) In the trial court there were several orderly state processes unused and yet available to petitioners to cure any curable defect in the posting or mailing of notices. The due process clause does not frown upon the use of the principles of waiver or estoppel to reach a fair decision (*Louisville & N. R. Co.* v. *Schmidt* (1900), 177 U. S. 230, 237).

Rationale of Waiver Law Applied to the Facts of This Case.

Under our Illinois practice the case on appeal for review "constitutes a continuation of the proceedings in the trial court" (Ch. 110, para. 74, Ill. Rev. Stats. (1955)).

The time limit for the service of notice of appeal provided by the Forcible Entry and Detainer Act is five days. (Forcible Entry and Detainer Act, Ch. 57, para. 19 (1955), Ill. Rev. Stats.)

Section 20 of the Municipal Court of Chicago Act (para. 375 of Ch. 37 (1955), Ill. Rev. Stats.) provides for the adoption by that court of Rules of Practice, and had either of the defendants wanted relief from a curable irregularity in the posting or mailing of notices by the bailiff, they could have (1) *before* judgment filed a special appearance before taking other action "for the purpose of objecting to the jurisdiction of the court over the person of the defendant" under Section 20 of Rule 1 of the Municipal Court of Chicago, or (2) *after* judgment they could have proceeded either under Section 21 of the Municipal Court of Chicago Act or under Section 50(6) of Rule 1 of the Rules of the Municipal Court of Chicago or under Ch. 37, Sec. 403 First (c), Ill. Rev. Stat. (1955).

Petitioners served and filed notice of appeal in the trial court four days after it rendered judgment for possession.

It is enough for the determination of this petition to know that there is nothing in the Forcible Entry and Detainer Act to prevent a defendant either before judgment or during the 5-day period allowed for service of notice of appeal from raising the point of jurisdiction of the person.

Requisite Element of Curability.

If there was a defect in the posting or mailing of notices, it was a curable one inasmuch as if the bailiff did not post or mail the notices in the correct way, then under the statute the case could have been continued until he did (Ch. 37, para. 403, First (c) (1955), Ill. Rev. Stat.). The trial court had jurisdiction of the subject matter under the statute, and it also had territorial jurisdiction of the premises involved. The particular case is within the class of cases of which the Municipal Court of Chicago has jurisdiction of the subject matter (para. 2 of Municipal Court of Chicago Act, Ch. 37, para. 357 Fourth (d) (1955), Ill. Rev. Stat.). No personal service was required. Defects in publication, posting or mailing are merely procedural and are dilatory in character because they do not go to the merits of a controversy or to jurisdiction of the subject matter and are curable. Accordingly they are in the category of matters which can be waived.

Both the Appellate Court Decision and Its Opinion Were Correct.

The Appellate Court, consistent with axiomatic law based on the idea that a party-litigant cannot be allowed to stand by in the trial court and fail to urge a curable objection and then for the first time claim it in the Appellate Court, held that by joining in the appeal the named defendant,

Ruth Page Fisher, submitted herself to the jurisdiction of the court and that the attempt to raise any question of service of process upon her came too late.

If the law were otherwise, a party-litigant could, in a case where postponement was of the essence, secure such delay, by passing over the trial court. The right of appeal does not include a right to stand mute in a trial court and then take an appeal and not be held to have waived matters of a curable character which could have been raised in the trial court (*Rohrhof* v. *Schmidt* (1905), 218 Ill. 585, 587; *Allen* v. *Sanders* (1938), 369 Ill. 466, 469).

Illinois Law of Waiver Which Petitioners Now Seek to Attack Is Not Violative of the "Due Process" Clause of the 14th Amendment of the Federal Constitution.

When a party voluntarily appears in a cause he cannot thereafter claim that he was denied due process merely because he was not served with process when the original action was commenced. Such matter is one of abatement, and can be waived.

Louisville & N. R. Co. v. *Schmidt* (1900), 177 U. S. 230, 237.

A state "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Snyder v. *Massachusetts* (1934), 291 U. S. 97, 105.
West v. *Louisiana* (1904), 194 U. S. 258, 263.

Due process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgment.

American Surety Co. v. *Baldwin* (1932), 287 U. S. 156, 168.

The sole object of process is to notify the defendant of pending litigation so as to secure his appearance, and a person may subsequently appear even after judgment and become bound by the foregoing proceedings as if initially served.

Lord v. *Hubert* (1957), 12 Ill. (2d) 83, 87.

Inherently it would not be consistent with any policy of fairness, state or federal, to hold that a defendant, with regular trial court procedures available to him to cure a curable defect, could pass over the trial court and not be held to have waived the point. Otherwise a defendant would get an advantage by delay which would be unjust. Justice or fairness does not permit generosity to one party at the cost of the other party.

Petitioners' Authorities Distinguished on the Facts.

There is no conflict between Illinois cases which hold (1) that a curable defect not urged in the trial court and urged for the first time on appeal is waived and Illinois cases which hold (2) that a party may appeal to the upper court without first availing himself of some *one* of the particular procedural channels in the trial court. There is a material difference between a requirement that at least one of the several channels be used in the trial court and a requirement that a specific one instead of others has to be used. Counsel cites *Atlas Finishing Co.* v. *Anderson*, 336 Ill. App. 167; *Climax Tag Co.* v. *American Tag Co.*, 234 Ill. 179 and Section 68.3 of the Illinois Civil Practice Act (Pet. for Cert. p. 21) to the effect that a litigant doesn't have to proceed by any particular motion where the point has been otherwise preserved. Also counsel cites cases which hold that a litigant does not have to make a motion for new trial to preserve a point otherwise made in the trial court. *Keith* v. *Arnold & Co.*, 254 Ill. App. 115;

Transcontinental Ins. Co. v. *Rosenbloom*, 274 Ill. App. 341; *Niagara Fire Ins. Co.* v. *Forehand*, 169 Ill. 6[illegible]; *Trout* v. *Herrin*, 245 Ill. App. 346. (Pet. for Cert. p. 22).

The intent of the Illinois law, when read and understood in its entirety, inclusive of Section 68.3 of the Illinois Civil Practice Act is not that the trial court is to be kept entirely uninformed about a defect which was curable in the trial court. Such an intent is entirely at odds with the function of an appellate court.

The point under Illinois law on the facts of our case is not merely that the defendants did not proceed under *one* particular rule or pigeon-holed procedure by which they, collectively or separately; could have objected on the ground of some irregularity of the bailiff in his posting or mailing of notices. The point is that neither of them made any objection in the court below under *any* of the regular avenues of procedure which were provided for them to follow there either before or after judgment. The defendant Thomas H. Fisher filed an answer without raising this point, and the defendant Ruth Page Fisher filed a notice of appeal in the trial court without having raised this point in the trial court. Hence the Illinois law of waiver or estoppel was applied.

Counsel cites other Illinois cases which are not before this Court either on the facts or on the law:

Moffat Coal Co. v. *Industrial Com.* (1947) 397 Ill. 196 (Pet. for Cert. p. 22); *The People* v. *Evans*, 262 Ill. 235 (Pet. for Cert. p. 22); and *The People* v. *Coal Belt Electric Railway Company*, 311 Ill. 29 (Pet. for Cert. p. 22).

Such cases do not hold that jurisdiction of the person could not be waived by failure to proceed in accordance with the routine procedure set up in a trial court, and that a party litigant could skip that routine procedure for objections below without being held on appeal to have

waived objections that were curable in the event such routine procedure had been followed.

The fact that neither defendant has shown that he or she was deprived of "due process of law" is not predicated on the claim that one of them was the wife of the other. *Robinson* v. *Robinson*, 329 Ill. App. 515 (Pet. for Cert. p. 12).

What Constitutes the Waiver.

It is not solely the fact of appeal which constitutes the waiver: It is the fact of appeal taken with the fact of not having proceeded in the court below to cure a curable defect which constitutes the waiver of an objection to the jurisdiction of the person as distinguished from jurisdiction of the subject matter. With such waiver or estoppel a money judgment for costs was proper and not unconstitutional. In none of the cases cited by the petitioners was that basic element of waiver or estoppel involved on the facts. (*Mead* v. *Mead*, 205 Ill. App. 327; *Bickerdike* v. *Allen*, 157 Ill. 95, 102; *Griffin* v. *County of Cook*, 369 Ill. 380, 387-8; *Harty* v. *Smith*, 74 Ill. App. 194; *G. A. Crancer Co.* v. *Williams*, 191 Ill. App. 451 (Pet. for Cert. pp. 18, 19).

Also in none of the United States Supreme Court cases cited was there a factual situation involved where a party was factually brought within a state court rule of law that a party litigant cannot keep silent in the trial court and then raise a curable defect on appeal for the first time without exposing himself to the law of waiver or estoppel or which says that such a state law is violative of the Fourteenth Amendment of the Federal Constitution. Thus *on the facts* are distinguished the cases of *Standard Oil Co.* v. *Missouri ex rel. Hadley*, 224 U. S. 270, 280 (Pet. for Cert. p. 17); *Shelley* v. *Kraemer*, 334 U. S. 1

(Pet. for Cert. p. 17); *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673 (Pet. for Cert. p. 17); *Twining* v. *New Jersey*, 211 U. S. 78 (Pet. for Cert. p. 16); *Scott* v. *McNeal*, 154 U. S. 34 (Pet. for Cert. p. 15).

CONCLUSION.

The Illinois law does not allow a party to stand by and allow her co-defendant to carry the burden of the trial, and then join with him in an appeal which raises all points which could be raised on the merits, and expect to get a hearing on appeal not only on such issues as have been raised on the merits but also to get a hearing on an objection which could have been cured if it had been urged in the trial court.

The salutary rule of state law which holds that a person who appeals without raising in the trial court a curable point, which could have been raised there prior to or at the time of such appeal with reference to jurisdiction of his or her person, must be held to have waived such point—does not deprive that person of "due process."

Were the law otherwise a party could thus procure a valuable postponement of the coercive sanction evidenced by the trial court's order for a writ of restitution to issue at the end of ten days from the date of the judgment (Abst. 7). Were the law otherwise, a party could have a court of appellate jurisdiction only (Illinois Constitution, Art. VI, Par. 11), go through a determination of the case on all the points raised on appeal on the merits under orderly procedures in the state court by which the case reached final determination and then upset such determination on a curable point which was not raised in the trial court.

The "due process" clause must be raised and was not raised at the first fair opportunity for Ruth Page Fisher to have raised an objection to jurisdiction of her person in

the trial court under established practices which supplied her with ample opportunity to make such objection there had she not wanted the undue advantage of postponement during the period that she sought in the Illinois Appellate Court to get the case reversed on the non-federal merits.

There was (1) no violation of the Fourteenth Amendment by application of the Illinois state law of waiver or estoppel and (2) in any event it has not been shown by the petitioners that the "highest court" of the state or any state court passed on the federal constitutional question or that the point was raised at the earliest opportunity by either petitioner.

Hence the petition for certiorari should be denied.

Respectfully submitted,

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